THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

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Association Activities

THE STATED MEETING of the Association on March 14 will consider a report of the Committee on Federal Legislation, Eduardo Andrade, chairman, dealing with proposed subversive activities control legislation. This legislation stems from what was once called the "Mundt-Nixon Bill." There will also be presented a report by Milton Handler, chairman of the Committee on Trade Regulation and Trade-Marks, outlining that Committee's recent series of reports on antitrust legislation. A report from the Committee on Medical Jurisprudence on legislation providing for the establishment of a state commission to study and recommend further legislation for the rehabilitation of alcoholics will be presented by the chairman of the Committee, Edmund T. Delaney. Interim reports will be received from the Committee on Courts of Superior Jurisdiction, Samuel M. Lane, chairman; the Special Committee on Broadcasting, Harrison Tweed, chairman; and the Joint Committee on the Lawyers Bureau, S. Hazard Gillespie, Jr., chairman.

BETHUEL M. WEBSTER has been elected by the Executive Committee as the Association's representative in the House of Dele-

gates of the American Bar Association. The selection of a new delegate was made necessary by the resignation of Franklin E. Parker, Jr., who has been the Association's representative for the past five years. Mr. Parker resigned to accept the position of State Delegate to the American Bar Association.

ON MARCH 21 The Right Honorable Lord Nathan of Churt will speak on English Law and the Nationalized Industries, under the auspices of the Committee on Post-Admission Legal Education, Ralph M. Carson, chairman. Lord Nathan was Parliamentary Under-Secretary of State for War and Vice-President of the Army Council, August 1945 to October 1946, when he was made Minister of Civil Aviation, from which post he resigned to resume the practice of law in May 1948. Lord Nathan is a member of the Privy Council, was a member of Parliament from 1929 until created a peer, and is presently serving as chairman of a committee appointed by the Prime Minister to enquire into the law relating to charitable trusts. He served in World War I, commanding for a time a battalion of the first City of London Regiment, and is an honorary Colonel of the 568th Anti-Aircraft Regiment (Royal Artillery) and an honorary Air Commodore of the Auxiliary Air Force.

THE COMMITTEE on Labor and Social Security Legislation, Herbert W. Haldenstein, chairman, has under consideration a report of a subcommittee on the problem of defining the areas of State and Federal authority in the labor field.

ADOLF A. BERLE, JR., chairman of the Committee on International Law, and Dana C. Backus, vice-chairman, represented the Association at hearings in January before the subcommittee of the Senate Committee on Foreign Relations considering the Geno-

cide Convention. The Committee has continued its study of definitions of aggression under international law and will undertake the preparation of a report on the existence of legal obligations to recognize foreign governments. The Committee also has under consideration reports on the President's Point Four program.

AT THE REQUEST of the Executive Committee the President will report to the membership in March on the excellent progress of the Association's group accident and health insurance plan. At that time over two hundred applications had been received and one claim had been filed. The plan is now in full force as to those applicants who are "insurable" and will become effective as to "uninsurables" as soon as a total of one thousand applications have been received. It is important, therefore, for the benefit of those who are uninsurable that applications be made promptly. Uninsurables would not be eligible for an individual non-group policy.

THE COMMITTEE on Trade Regulation and Trade-Marks, Milton Handler, chairman, reported to Congress that it approved S. 1008, a bill designed to effect a solution of the current basing point and freight absorption problems, but the Committee also suggested substantial improvements which should be made in the bill as drafted. The Committee also advised the House Judiciary Committee that it disapproved of H.R. 6679.

ON MARCH 8 the Committee on Medical Jurisprudence, Edmund T. Delaney, chairman, will sponsor a forum on Insanity as a Defense to Crime. The speakers will be City Magistrate Morris Ploscowe, John McKim Minton, Jr., Dr. Leo L. Orenstein, former Director of the Psychiatric Clinic of the Court of General Sessions, and Dr. Winfred Overholser, Superintendent of St. Eliz-

abeth's Hospital, Washington, D. C. The forum will be open to the public and there will be an opportunity for questions.

THE ENTERTAINMENT Committee, Judge James Garrett Wallace, chairman, has started rehearsals for the Annual Association Night Show. The show this year will be given on April 26, 27, and 28.

ON FEBRUARY 21 the Association's Committee on International Law, A. A. Berle, Jr., chairman, and the Committee on Foreign Law, John N. Hazard, chairman, entertained at cocktails seven Japanese judges and lawyers who are visiting the United States under a program sponsored by the United States Military Government in Japan. The guests of the Association were: Fumio Ozawa, the Attorney General's office; Koichi Inomata, Judge in the Tokyo Supreme Court; Yorihiro Naito, Judge in the Japanese Supreme Court; Yoshio Idei, Prosecutor; Kingo Osabe, Prosecutor; Shigeru Kuriyama, Judge in the Supreme Court; and Rinji Kondo.

WILLIAM B. HERLANDS, chairman of the Committee on Law Reform, has announced that his Committee has four of its recommended measures before the legislature. All four bills were introduced in the Senate by Senator MacNeil Mitchell, a former member of the Committee on Law Reform. These measures are:

1. Senate Int. 1587. An act to amend the civil practice act, in relation to limitations of time to commence action by non-enemies in enemy country or enemy-occupied territory. (Companion bill in Assembly introduced by Assemblyman Malcolm Wilson.)

2. Senate Int. 1588. Concurrent resolution proposing an amendment to Section Nineteen, Article Six of the Constitution, in relation to the holding by judges, justices or surrogates of any

other office. (Companion bill in Assembly introduced by Assemblyman Justin C. Morgan).

3. Senate Int. 1632. An act to amend the civil practice act, in relation to testimony of husband and wife in divorce actions. (Companion bill in Assembly introduced by Assemblyman Bernard Austin).

4. Senate Int. 1634. An act to amend the general construction law, the penal law, the civil practice act and the code of criminal procedure, in relation to the use of a declaration that written statement is made under penalties of perjury, as alternative to oath. (Companion bill in Assembly introduced by Assemblyman Justin C. Morgan).

THE ANNUAL EXHIBIT of members' paintings will be open on April 11. Notices of the opening will be mailed to the membership. The art show this year promises to have more exhibitors than any previous show. Julian E. Levi, well-known American artist, will again serve as consultant to the Committee. The Subcommittee in charge of the art show is Wilberforce Sully, Jr., chairman, Samuel A. Berger, David M. Solinger and René A. Wormser.

The Calendar of the Association for March

(As of February 27, 1950)

March 1
Dinner Meeting of Committee on Administrative Law
Joint Meeting of Section on Drafting of Legal Instruments and Section on Wills, Trusts and Estates
Meeting of Committee on Foreign Law
Dinner Meeting of Committee on Professional Ethics
"On Trial"—Television Program, WJZ–TV (Channel 7), 8:00 P.M.
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

March 2
Dinner Meeting of Committee on Aeronautics
Dinner of Committee on Junior Bar Activities
Forum on Practical Problems of Surrogates' Practice, Committee on Junior Bar Activities
Meeting of Section on Labor Law

March 7
Meeting of the Committee on the City Court of the City of New York
Dinner Meeting of Executive Committee
Meeting of Committee on State Legislation
Meeting of Committee on Unlawful Practice of the Law

March 8
Forum on Insanity as a Defense to Crime, Committee on Medical Jurisprudence and The New York Academy of Medicine (Committee on Public Health Relations)
Dinner of Committee on Medical Jurisprudence
"On Trial"—Television Program, WJZ–TV (Channel 7), 8:00 P.M.
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

March 9
Meeting of Section on Taxation

March 13
Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Real Property Law

March 14
Meeting of Committee on International Law
Meeting of Committee on State Legislation
Stated Meeting of Association and Buffet Supper—6:15 P.M.

March 15 Meeting of Committee on Admissions
Meeting of Special Committee on Broadcasting
Meeting of Section on Corporations
Dinner Meeting of Committee on Insurance Law
"On Trial"—Television Program, WJZ–TV (Channel 7), 8:00 P.M.
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

March 20 Dinner Meeting of Committee on Medical Jurisprudence
Dinner Meeting of Committee on Municipal Affairs
Meeting of Section on Trials and Appeals

March 21 "English Law and the Nationalized Industries." Speaker: The Right Honorable Lord Nathan of Churt. *Buffet Supper,* 6:15 P.M.
Meeting of Committee on State Legislation

March 22 "On Trial"—Television Program, WJZ–TV (Channel 7), 8:00 P.M.
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

March 27 Meeting of Library Committee
Round Table Conference. Speaker: The Honorable I. Montefiore Levy, Justice of the Domestic Relations Court of the City of New York

March 28 Arbitration Demonstration, Committee on Arbitration
Dinner Meeting of Committee on Law Reform
Meeting of Committee on State Legislation

March 29 "On Trial"—Television Program, WJZ–TV (Channel 7), 8:00 P.M.
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

March 30 Meeting of Section on Trade Regulation

Next Steps in Rent Control

By Herbert Wechsler

Rent Control deals with a basic and inexorable clash of interest: that of owners in increasing their return upon their properties and that of renters in avoiding increase in their rent. It is not surprising, therefore, that there is more talk than thought upon the subject; and that full responsibility of utterance does not pervade the discourse in the field. Too many owners have embraced whatever slogan or position seemed at hand to further their conception of their interest; too many renters talk as if their natural rights were violated by the very possibility of an advance in rent. The problem calls for candid study from the point of view of public interest—in the largest sense of what is right and just for all concerned.

Viewed in the large there are, of course, three basic questions: (1) Is continuation of control desirable? (2) If so, by whom? (3) What principles should govern the control, so long as it endures?

I

If the first question is the largest for the nation as a whole, it is certainly the smallest in this City. We may say of the continuation of control within this area what Justice Holmes affirmed of continuity in general: it is not a duty; it is only a necessity. We face a shortage that has had a long duration and by all accounts is

Editor's Note: Mr. Wechsler, a member of the Association's Committee on Federal Legislation, is Professor of Law at Columbia University and a member of the Temporary City Housing Rent Commission. This article is an adaptation of an address made by Mr. Wechsler before the Citizens' Housing and Planning Council of New York. It does not, of course, represent the views of the Association or the Association's Committee on Real Property Law. With the permission of the chairman of the Association's Committee on Real Property Law, Lewis M. Isaacs, Jr., there is published as an appendix to Mr. Wechsler's article an informal memorandum prepared by Mr. Isaacs, as the basis for discussion with Mr. Wechsler of the problems his article presents. It is to be noted that the memorandum was not intended for publication and does not purport to be definitive but it is thought the memorandum might well serve to point up some of the difficulties in the administration of a system of rent control.

still acute in all but highest rental brackets. Production of new housing units in the City totals something less than 80,000 in the last four years—serving primarily the top and bottom income levels. It has not kept pace with the increase of new family units seeking to be housed. Estimates vary, to be sure, of the production needed to restore a normal rental market; there are also variations in conception of what normalcy implies. But there is nothing in these differences that can affect the present diagnosis. Now and, no doubt, tomorrow the removal of control would give to ownership the power of monopoly in fixing price; and this within a field in which there is not even competition of desires—since everyone must have a home.

Power of this sort has never had a standing in our law or policy; it must be broken or controlled. Those who deem this an affront to property or to its status and protection in our system have, I think, succumbed to the temptation that we all confront to turn our private hopes into a credo for the public.

To say that there is smallest question of the need for the continuation of control, is not to say that the control should be the same for every type of rental property or that the need extends to every type of dwelling. Two and three family structures may pose different problems than apartment houses; there may be differences at different rental levels. Any system of controls should, therefore, include mechanisms for alleviation or for termination, including the authority to re-control if an erroneous determination should be made.

Nor may one blink the fact that rent control, however much it mitigates the evils of the housing shortage, has no power to effect a cure. It has been argued that it is a factor tending to prolong the shortage by eliminating the necessity of sharing housing that a sharp increase of rentals would produce. But shortage is a term that carries meaning in relation to a given living standard. I for one am not prepared to give attention to the man who thinks our present standard is too high. It also has been argued that control discourages construction. New buildings and conversions have,

however, been quite free to find their ceilings in the current markets; and the ceilings they have found have universally been high. It makes small sense, therefore, to say that the existence of control is what discourages production for the middle and the lower level rents. Removal of controls might have a tendency to stimulate unsubsidized construction—but for rentals that would not be lower than the levels that the builders are producing for today. And is it not the proper inference that such construction would cease well before supply reached close enough to the demand to bring the rentals down?

Public policy must find a way to stimulate construction for the middle rental level and legislative measures to this end have been proposed. Their success, as much as any other factor, will determine how long rent control is needed in New York.

II

Interest today is focused largely on the second question: control by what authority? As matters stand there is a duplication in the City which presents its difficulties and is under litigation in the courts. I will confess that as a legal matter it surprises me to find the federal authority contending for exclusive jurisdiction; but the place to try a law suit is in court. The issue may, in any case, be settled by the course of legislation. If Congress chooses to continue federal control, I suppose it still has the authority to make express provision for its exclusivity wherever it obtains. Federal law permits the state to terminate all federal participation. The state can undertake the full responsibility itself or authorize municipalities to do so or adopt both plans in combination. Opinions differ on the wisest choice among these possibilities; and the matter is receiving full attention now. Since I cannot disclaim involvement in the resolution of these issues, I cannot helpfully participate in their debate. Whatever view is finally adopted—whatever governmental levels are assigned the function—the important thing is that control be exercised with justice and efficiency.

I do not see how this could be accomplished if, as some propose, the duty of adjusting rents were vested in the courts. That was, of course, the method used in this state after World War I and it is used in the commercial rent field now. The argument that it should be adopted for all dwelling rentals in the City tempts a comment on the state of our ability to profit from experience. For students of the 1920 system are agreed that it was costly to both sides; it swamped the courts; it bred delay, enhanced antagonisms and produced anarchical results. Look at the book by Judge Edgar J. Lauer and Victor House, published in 1921, called *The Tenant and His Landlord* if you want a record of contemporary judgment. With rare restraint they summarized their view by saying: "It would seem as though with a little additional consideration and thought by the Legislature, some more satisfactory method might have been devised . . ." (p. xiii). The administrative method has its difficulties but it is undoubtedly the only method that can serve the purpose adequately, subject, of course, to the conventional judicial review of administrative action. It would set the clock back many years and work a major injury to the judicial system, if the administrative method were abandoned now.

Believing this, I feel constrained to add that sound administration is conducted in judicial spirit; and the first thing that implies to me is that it hears before it finds. Only recently our Court of Appeals felt obliged to give effect to rent increases retroactive seven months before the date of the determination where the tenants did not even have a notice that the application had been filed. Whatever one may think of the decision, resting solely upon constitutional and jurisdictional considerations, there can be no occasion for administrative procedures such as these. Notice and hearing are the indispensable constituents of any fair procedure—no less in this field than in others; their absence breeds mistake, suspicion and hostility. More than this, a hearing serves to bring owner and occupants together and thus provides a chance to work out a consensual adjustment—with some give and take upon both sides. The possibilities of such adjustments—dealing with the

tenants as a group—have not, it seems to me, had the consideration they deserve. Where they develop to the satisfaction of both sides, as has occurred in some of the hotel cases re-examined by the City Rent Commission, I can see no public reason for denying them effectiveness. The analogy to wages and collective bargaining—aided by mediation and with arbitration in the background—seems quite clear. Where peace can be negotiated fairly, it should help, moreover, to rehabilitate landlord-tenant relationships—which now, as in the 20's, reach the level of cold war.

III

There remains the problem of the principles that ought to govern rent adjustments so long as the control endures. This is, of course, the largest issue and my comments are put forth both tentatively and with diffidence. If any aspect of the subject needs constructive thinking, this is it. What is the right direction for our thought?

We start quite simply with the basic reason for the public intervention: That scarcity has given ownership the power of monopoly in fixing rents. If that is so, why is it not a fair appraisal of the object of control to isolate and neutralize the factor of monopoly position? I should suppose the way to do that is to try to judge what return any given property would yield under conditions of an adequately unrestricted market and then translate that figure equitably into rents. How to determine such return presents a problem, to be sure, but hardly one that will not yield to business judgment and to competent analysis.

The initial figure, I should think, would be the net return before the scarcity attained abnormal status, that is, when control began. This should at least be a presumptive indication of the net in any normal market picture—though it may call for some adjustment on a showing that the situation was subnormal at that time. The second figure is the net today, judged by the same accounting standards. Increase in costs, upon the one hand, and decline in vacancies or services, upon the other, will be reflected and

to some extent off-set in present net. Absent changes in the nature of the property or grossest inefficiency in management, the owner has a grievance if his present net is lower that it was upon a normal market; and changes in the value of the dollar give some argument for the enhancement of return—in so far as it exceeds fixed charges, with correlative protection for the other side to cushion shocks that are too hard.

Where there are changes in the nature of the property—whether improvement or deterioration—former and present return are no longer comparable. But in such case one can examine norms derived from general experience of such returns on properties of the new class; these norms are needed anyhow in checking history on any individual property. In this light it should be possible to judge what the changed property would yield without the aid of the abnormal situation.

I do not see why such a method would not usually give us what we want. I stress *usually* for this is the barest statement of what seems to me intrinsic in the underlying reason for control. A property that yielded net of $20,000 is impaired if it can yield but $5,000 today; if it can now yield $50,000 it is benefiting from the abnormality that leads to the control.

It may, of course, be argued that where properties produced a marginal return before the scarcity developed, the owner should receive a benefit from the monopoly position to induce him to maintain a rental unit and to compensate for bad luck in the past. The merit of that argument depends upon the history of the particular situation and its ownership. One of the virtues that I claim for this analysis is that you recognize that case for what it is.

It is, of course, quite difficult to make the judgments I have indicated with respect to every individual property when units number those that are involved. But rent control affects the values of billions in real estate and the welfare of millions of its tenants; it can not be attempted without the equipment needed for the job.

The approach I have suggested seems to me compatible with

"fair net operating income" as that principle is written in the Act of Congress. But it is not the standard that the Expediter has prescribed. For even if his norms of 25 and 30 per cent of annual income do not rest upon too general experience to be employed in any given area, it seems to me that he has made extravagant allowance for the property with marginal return, regardless of the reason why return is marginal or the pre-scarcity position of the unit. He has, in short, accorded run down properties the right to take a very large advantage of monopoly position, raising their return to levels that we have no reason to believe they would achieve if any normal rental market had survived. This may be what the Congress meant in fact when it accepted "fair net" as a principle; if so, the position seems to me to call for reconsideration from the point of view of all concerned. Though I say this, I also say that Mr. Woods appears to me have advanced the cause of solid thought by pointing to net operating income as our central figure and avoiding the conception of a measure of return on value that so many think should be employed.

Value is a word of many meanings but in any normal meaning it has small utility in regulating rates or price or rents. The reason is, of course, that value in an economic sense depends so largely on anticipated earnings; and the problem of the regulating body is to judge what those earnings may be. To paraphrase what the United States Supreme Court said of rate-making: Since value is the end product of rent fixing it can not be the starting point as well. If it were, every rent increase would, as Judge Botein observed in an hotel case in New York, construct the basis for a further increase—until the market limit had been reached.

The dilemma can perhaps be dodged in rent making by using value figures prior to inception of control, such as assessments at that time. This is, indeed, the value that control should not impair. But this involves embarking on what often is a difficult and costly speculation, far less promising in my opinion than an analysis based mainly on return. A proper value judgment prior to control will rest primarily on that, in any case, as any business man

would normally agree. Who ever judged what he should pay for real estate by its assessment, rather than judging after study of the situation whether the assessment was too low or high?

A theory of return upon investment poses different problems, summarized by asking: Whose investment—when? It certainly would be unjust to strip away value appreciation prior to the imposition of control in cases where the property had been long held and built or bought when prices were at ebb. Nor does a speculative purchase, banking on decontrol or on rent increase, have a claim for recognition. Again I say that Mr. Woods was right in using net return as the central figure; the difficulty lies, I think, in where he went from there.

IV

If valid principles require major rent increases any public body with authority must have the courage to award what may be due. But tenants have a set of expectations that deserve consideration; they call, at least, as I have said, for cushioning a shock that hits too hard. Why, for example, should it not be possible to graduate advances to allow for preparation to defray them or, indeed, for working out change of location, difficult as that may be? There is, in short, a case for moderation and the instruments of moderation are more numerous than those thus far employed.

Needless to say, the views I have expressed, however tentatively, are my own alone; and in so far as I may have a share in exercising a responsibility within the City, I shall be quite prepared to be persuaded that these views are wrong. Rent control presents a problem that requires active thinking. I shall not mind the risk of having to confess error, if I can give an impetus to thought.

APPENDIX

In fixing any formula for determining the rent to be paid by tenants under rent control, the following must be borne in mind:

1. While from the owner's point of view the total rent from a building is all that concerns him, from the point of view of each individual tenant it is

the rent payable for the apartment that is of importance. A formula which is devised to arrive at a net or gross rent for the whole building and which does not in its allocation among apartments take into consideration any factor other than the number of rooms and possibly the location, is unfair and discriminatory in that benefits given to one tenant are charged to others. For instance, in 1947 and 1948 certain tenants agreed to a 15% increase on condition that certain work was done and possibly certain equipment installed. In several buildings landlords supplied new iceboxes upon receipt of the 15% increases. Under the Federal formula a landlord who thereafter applied for increases in rents in the building was entitled to include as part of his expenses a *pro rata* of the cost of new iceboxes. Any increase on a building was allocated among all the tenants being first, however, charged to those tenants who had not agreed to the 15% increase. The result is that in buildings where some tenants paid the increase and some did not, the cost of iceboxes given to those who paid the increase is again charged by the Federal Administrator's application of his formula to those who did not receive new iceboxes, obviously a discriminatory and unfair result.

2. Any formula which assumes a percentage of anything to constitute a "fair return" to a landlord ignores factors which all real estate minded people consider of great significance, for example, the adequacy of a building. If the formula is based on a percentage of value, the unfairness of the result is quickly obvious. For example, an old cheap building erected on a valuable piece of land on Park Avenue could not under any normal circumstances produce an income which would fairly reflect the value of the land and building combined. If the formula were based on value the result would obviously be harsh and unreasonable. This explains why the courts in several commercial and business rent cases do not allow the statutory 8% return to the owner of real estate but rather less.

When the formula is not based on value but, as in the Federal case, on a percentage of gross income, the impropriety is not quite as obvious; but assume two buildings of the same height on the same size plot of land with similar apartments, one with four elevators and one with two. The former obviously has less rentable area and greater expenses of operation. The former, assuming the plot were small, would be considered an inadequate improvement and even in normal times could not produce a net income equivalent to the latter, yet by the blind application of a formula the owner of both buildings will receive approximately the same income.

Another unfair quality of the Federal formula lies in the fact that the gross income which is used as a base is a purely fortuitous figure, being merely the rents actually received on March 1, 1943 (plus such adjustments as may since then have been made). It is a recognized historical fact that some owners with vacancies in their buildings would rent them at low rents in order to fill up the building while others would prefer to maintain their vacancies and thus retain a theoretical "rent roll." Under the rent freeze the former owner was limited to lower rents than the latter. When the housing shortage took effect

the latter, with empty apartments, quickly filled them at higher rents, while the former was stuck with the rents he had been getting. The result which followed did not arise out of the "business judgment" of either; for no one in New York City foresaw the speed with which the housing shortage overtook us. October 1942 (the rent date for most residential apartments in New York) was one of the worst renting seasons New York City had seen in a long time. Residents of New York had left both for the army and for employment in other jobs outside of the City. Consequently the rents accepted by the landlord on October 1, 1942 were low, while vacancies were high. By October 1943 all of the vacancies had been filled, possibly sometime before October 1943. In any case in November 1943 a rent freeze was placed on all New York City apartments as of March 1, 1943. The rents received on March 1, 1943 were for the most part, therefore, rents charged on October 1, 1942, so that the landlord who managed his building well in 1942 and did not demand exorbitant rents was frozen with these low rents, while the one who preferred to take a chance on getting higher ones benefited. There is nothing in the Federal rent laws or their administration which has recognized or sought to correct this inequity. The so-called 5A11 Formula based on comparability, although sometimes applied has been applied without regard to the fact that the courts in this city and state have recognized from time immemorial that there is practically no such thing as comparability in either apartments or buildings in this city. In fact, in certiorari proceedings and in condemnation proceedings evidence of rents received in other buildings and expenses of maintenance in other buildings has been regularly and properly excluded. Under the rule of *Res inter alios acta* it must be recognized that a five-room apartment in one building is not comparable to a five-room apartment in another building merely because the number of rooms are the same. Sizes, shapes, locations, noises, equipment, service, character of tenancy, caliber of operation are all factors which tenants, courts and real estate owners and practitioners take into consideration. Only the Rent Administrator ignores these factors.

3. If a formula be based on net income procured by a building in October 1942, even if it allows for some recognition of the decreased value of the dollar, it would not represent a fair formula for the following reasons: First, as above pointed out, October 1, 1942 rentals were low, and while expenses likewise were low, they were not equally low. Secondly, the formula ignores the fact that different people manage buildings differently. For example, assume a building poorly managed in 1942 with a low income, thereafter sold to the present owner, an economical but good real estate operator. If the net income of the building alone were the formula base, the good operator would be prohibited from procuring increases because the building was formerly managed by a poor operator. *Per contra*, if a building was well managed in 1942 and produced a good income and is thereafter sold to the present operator, who is a poor manager, the present owner would receive a greater increase in rents than he is entitled to because it happened that on the formula date the building was well operated.

This particular point brings to the fore another factor, which is completely ignored by the Federal Administrator and by many landlords, and that factor is the services and equipment which go with an apartment. Tenants in the lowest type of apartment receive by way of services only heat, hot and cold water and occasional painting. Tenants in the higher class apartments, however, receive not only those services but the services of doormen, handymen, porters, elevator operators, intercommunicating systems, garbage disposal, etc. etc. While the better class of real estate operators have continued for the most part to maintain services previously rendered, the chiselers have found ways of cutting down on all services without being penalized by the Administrator. Typically these chiselers apply for and receive rent increases on the basis of expenses, using as their base year the period during which there was full employment in the building. Immediately the increase is granted, the chiselers fire their help and cut down on their services, and thus procure the double advantage of increased rents and reduced services. Any formula must take into consideration that the fixation of rent for apartments in the open market is determined not alone by size and location but also by these services and equipment. I do not mention the fact that the increased costs of giving these services must have been considered because it invariably is when the services are given. When the services are denied, however, the landlord either does not seek a rent increase or conceals the record facts.

None of the above is intended to prove that no formula is possible but only that any formula which is devised must be exceedingly flexible however difficult its administration, and if inflexible is bound to further the very antagonisms between landlord and tenant, which it is hoped can be abated.

Ease of administration is only one of several factors to be borne in mind. It is the end and not the means that matter. The end sought is a proper rent, and if the means, however simple and economical, of administration do not produce that result, in practically every case it were as well that no formula were used.

L. M. I. Jr.

Minimum Standards of Judicial Administration

By Lester E. Denonn*

There is a new game which will soon sweep the country as has canasta. It will be of particular interest to the legal profession and others concerned with problems of government revolving about judicial administration. It bears the intriguing name of PWP and is played with the new volume edited by Chief Justice Arthur T. Vanderbilt as its text and source.†

PWP studies the reports of the American Bar Association's Section of Judicial Administration over the past twelve years and the recommendations made for reform. The player studies the problems of judicial selection, managing the business of the courts, judicial regulation of procedure, the selection and service of juries, pretrial conferences, traffic courts, justice of the peace courts, appellate practice and state administrative agencies and tribunals. A column (as in the chart appended hereto) sets forth the recommendations made by the American Bar Association on each of sixty-two subjects and, with the aid of sixty-two comprehensive and graphic maps contained in Judge Vanderbilt's stimulating volume, the player then notes the variances among the states (as in the third column). Finally the player of PWP sets forth the extent to which his state has or has not adopted each recommendation (as in the last column with respect to New York).

The object of PWP is to Point With Pride to any situation in which the player's state has equalled or bettered any of the sixty-

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* Mr. Denonn is the chairman of the Association's Committee on the City Court of the City of New York.

† *Minimum Standards of Judicial Administration: A Survey of the Extent to which the Standards of the American Bar Association for Improving the Administration of Justice have been Accepted throughout the Country.* Edited by Arthur T. Vanderbilt. Published by The Law Center of New York University for the National Conference of Judicial Councils, 1949. The Judicial Administration Series. Pages xxxii, 752.

two recommendations. Remembering, as Judge Vanderbilt so vigorously points out in his introduction, that these are but minimum standards, it is deemed a triumph when one can Point With Pride to the adoption of a recommendation. Hence when this is achieved, it is called "freezing the pack" of liberals who assert that the player's state has failed to adopt anything progressive since Civil War days. Inasmuch as this is a serious game, there is nothing "wild" in it. The player or players who best succeed in getting their local bar association stirred up to a realization of the importance of the problems raised and the value of this study of the recommendations are deemed the winners.

Each chapter of *Minimum Standards* is devoted to a discussion of the recommendations, the basis for their determination and the status of the problem throughout the country. Statistics have been carefully gathered with the assistance of many acknowledged by the editor. The possibility for error in a vast undertaking of this sort is great, a fact of which Judge Vanderbilt is fully conscious. It is for that reason that the problems raised should be reviewed in the light of actual conditions in each state. Appendices contain various of the Section reports in 1938, 1939 and 1940. Progress since then has been slow and will continue to be so, as the editor recognizes, but one cannot deny the possibilities for sterling successes when one realizes the many accomplishments to which the State of New Jersey can point with pride and which the editor's modesty suffers to pass unmentioned. He does, however, indicate the reasons which prompted the preparation of this volume and the extent to which it is of importance to laymen as well as the Bar: "Where the bench and Bar cannot or will not modernize the judicial structure and methods, what choice has one but to encourage laymen to undertake the task? These considerations led the Committee on Improving the Administration of Justice to urge the publication of a book which would make clear to lawyers and laymen alike the extent to which each state was measuring up to the minimum practical standards of judicial administration of the American Bar Association." He succinctly

concludes his introduction with a challenge to a serious study of the contents of this volume: "What more important cause can there be to engage the support of any intelligent citizen, be he lawyer or layman? To such patriotic citizens as may be interested in these vital matters in a time of unrest and doubt, this volume is tendered not as a literary effort but as an arsenal of facts."

Just a word of warning about the chart that follows. By its very summary treatment of the topics, many of the nuances of the book's treatment are lost. In addition, there are other equally important subjects discussed, which have not been included in the maps. Hence this chart is but an invitation to learning that only the book itself can satisfy. This review is offered with the hope that it will stimulate concern about the important problems raised and some earnest and steadfast work in New York State and elsewhere to bring to fruition, at least, the minimum standards recommended.

CHART

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
1. *Principal Modes of Selection of Judges*	Missouri Plan—appointment from recommended list—election on record after trial term.	Only a few have approached the idea of the Plan; some states appoint, most elect judges.	In the group of the majority with most judges elected.
2. *Tenure of Appellate Judges*	For life or good behavior after election.	Vary from less than five years to life.	Among ten states with terms of more than ten years.
3. *Tenure of Trial Court Judges*	For life or good behavior after election.	Vary from less than five years to life.	One of two states with terms of more than ten years.
4. *Unified Judicial System*	Should be a unified system with a judge empowered to assign judges to relieve congestion.	Vary widely from no unity to unity in some of the courts and only three states having a substantial degree of unity.	Among sixteen states with some effective control of one or more sets of courts, but no real unity.

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
5. *Judicial Councils and Judicial Conferences*	Should be strengthened to include representation of the bar and the legislative judiciary committees.	Twelve with none; fifteen with; some inactive, some without representation of the other groups.	Among the fifteen with.
6. *Judicial Statistics*	Quarterly judicial statistics should be required.	Some none, some for some courts only, some sporadic.	With but a few others which regularly compile statistics.
7–8. *Judicial Rule Making; Exercise of Rule-making Powers*	Practice and Procedure should be regulated by the courts having rule-making power.	Vary from none to complete.	Among those states regulating almost completely by statute.
9. *Selection of Jurors*	Should be selected by Commissioners appointed by the courts. The Cleveland key-number system is recommended for metropolitan centers.	Sharply divided as to method of selection and by whom.	Among those states providing for selection by county or municipal officials rather than by the courts.
10. *Voir Dire Examination of Jurors*	Should be by parties or their attorneys or by the court as supplemented by parties or counsel. (Federal Rule 47)	Some of the states now follow the Federal Rule.	Among eleven states which generally permit attorneys alone to conduct the examination.
11. *Use of Alternate Jurors*	For long trials, one or more as regulated by Federal Rule 47.	Eleven states still have no provision for alternate jurors; some permit their use in felony or criminal cases in general only.	Among twenty-six states which allow for alternate jurors.
12. *Pretrial Conferences*	For metropolitan areas; time dependent upon local conditions; should be conducted by a judge; should not compel disclosure of details of proof if counsel objects.	Since adoption of the Federal Rule 16, some states have adopted pretrial statewide; others locally.	Listed among those states where pretrial is not authorized. (This map undoubtedly prepared before the Supreme and City Courts in New York City adopted the practice.)

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
13. *Judge's Power to Summarize Evidence*	Should have this power.	States about evenly divided.	Listed among states which permit it.
14. *Judge's Power to Comment on Evidence*	Should have the power to analyze and comment on the weight of the evidence.	Most states permit it.	Listed among those which permit it—to some extent.
15. *Time for Charge to the Jury*	After final argument.	More than half of the states follow this practice instead of before argument of counsel.	Among those which follow the recommendation.
16. *Discovery*	Adoption of Federal Rules 26 to 37.	About fourteen states have similar rules.	Among those which have special provisions, some of which are liberal, but not precisely like the Federal rules.
17. *General Verdicts and Special Interrogatories*	Should follow Federal Rule 49 to allow special verdicts in connection with a general verdict.	About nine states do not permit this.	Listed among those which do.
18. *Partial New Trials*	Trial Judge should have this power where the issues in his judgment are separable.	About equally divided on this point.	Listed among those which require a new trial on all issues.
19. *Judgment Non Obstante Veredicto*	Following Federal Rule 50—to allow judgment on the original motion for a directed verdict after the jury has disagreed.	About half of the states permit this—the rest divided between those which allow it if motion made and decision reserved and those which disallow it altogether.	Listed among those which allow it if motion made and decision reserved.
20. *Voluntary Non-Pros*	Be permitted only in the legally reviewable discretion of the trial judge.	A majority permits this as a matter of right at various stages of the trial.	Listed among those which leave the discretion to the trial court.
21. *Master's Report—Jury Trials*	Federal Rule 53—Report can be read to the jury—subject to rulings on points of law.	Various approaches—from prima facie evidence to no use of the report at all.	Among states which do not use references in jury trials.

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
22. *Master's Report—Trials by Court*	Federal Rule 53—Should be accepted as to facts unless clearly erroneous. Trial court may take further evidence or recommit.	Again a wide variety of use or non-use as above.	The reports are persuasive only.
23. *Preliminary Injunctions*	Federal Rule 65—Granted only on hearing—temporary only to obviate irreparable injury.	Most insist upon notice.	Among the majority.
24. *Certificate of Title Laws*	Recommend such a law.	Most states have one.	Has none (now under consideration).
25. *Driver's License Laws*	The Uniform Vehicle Code.	Most states have adopted part of it. South Dakota does not require license for driver.	Has part of the Uniform Law.
26. *Service of Process on Nonresident Operators*	Recommends the provision.	All, except Utah, have adopted provisions along these lines.	Among the majority.
27. *Safety Financial Laws*	In favor.	Most have one. Three have none. One makes it applicable to commercial vehicles only.	Among the majority.
28. *Uniform Code—Act V*	Regulation of traffic on the highways.	About fourteen states have not adopted any part of the proposal.	Among those which have adopted it in part.
29. *Establishment of Separate Traffic Courts*	Recommended.	More than half do not have separate courts.	Permits it for first class cities only.
30. *Assessment of Costs in Traffic Cases*	The Michigan Uniform Ticket as a guide to relative extent of violations.	Vast majority do assess costs.	Not assess costs.

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
31. *Reports of Traffic Case Convictions to State Agency*	Recommends this practice.	Vast majority do.	With the majority.
32. *Statistics re Traffic Cases*	Recommended.	Vast majority do not compile statistics.	Among few which do through judicial councils.
33. *Effect of Error in Admission or Rejection of Evidence*	Not be grounds for new trial unless resulted in a miscarriage of justice.	Minority believe it presumption of prejudice to losing party—especially in a jury trial.	Among states which in jury or nonjury cases do not order new trial unless a miscarriage of justice not to do so.
34. *Exception to Admission or Rejection of Evidence*	Should not be required.	Only a few states still insist upon exceptions.	Among states which require exceptions only to charge or rejection of request to charge.
35. *Survivor's Testimony*	Connecticut Rule—permitting the testimony and also any oral or written statement of the decedent made in good faith.	Only a few states follow this rule.	Among states which bar such testimony except on consent or implied waiver.
36. *Deceased's or Insane Person's Statement*	Should be admitted if found to have been made in good faith and upon personal knowledge of declarant.	Very few states have adopted this view—some limit it to written statements.	With majority which allow such testimony only under the usual exceptions to the hearsay evidence rule.
37. *Physician-Patient Privilege*	North Carolina Rule that trial judge may require testimony if justice will be served.	Only a few permit this in limited form.	With majority which permit such testimony only on waiver.
38. *Extension of Privileges*	Privilege should not be extended to accountants, social workers or journalists.	Most states have not extended the privilege.	Among the majority.
39. *Evidence of Business Records*	Adopt the Uniform Business Records as Evidence Act (1936).	About half of the states cling to the criticized common law rules.	Among sixteen states which follow the recommended act.

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
40. *Opinion Rule*	Ordinary witnesses should be permitted to state their observations in a natural or non-technical manner.	A handful of the states have liberalized their rules.	Although the recommended rule is based on the 1934 study of the New York Commission on Administration of Justice, New York has not adopted it.
41. *Expert Testimony*	Model Evidence Code Sections should be adopted.	South Dakota has adopted it.	Rest cling to common law rules.
42. *Certified Copies of Court Records*	Federal Rule 44—Certified Copies should be admitted.	Most do.	New York among them.
43. *Judicial Notice of Foreign Law*	Can take judicial notice of common law and statutes of other states; law of foreign countries should be determined by the court.	Some have adopted this Uniform Notice of Foreign Law Act; some special statutes and some still follow the criticized common law.	Among those which have special statutes. (344a C.P.A.)
44. *Administration of Oath to Witnesses*	To each witness separately by court or clerk in a dignified and understandable way.	Some states swear in witnesses in groups; most either in groups or separately; some separately.	Among eighteen jurisdictions which follow the recommendations by rule.
45. *Scintilla Rule*	Should be abolished. (This requires submission to the jury of every issue even if only a scintilla of evidence has been adduced.)	Alabama still follows the rule, a few states direct a verdict if a scintilla not contradicted.	Among vast majority that abandon the rule.
46. *Examination of Witnesses*	Adoption of Federal Rule 43b that hostile or unwilling witnesses or adverse party may be interrogated by leading questions.	A majority of states have provisions similar to the recommendation.	Not listed among the majority.
47. *No Bona Fide Dispute of Fact*	Any rule of evidence need not be enforced where there appears to be no bona fide dispute as to the fact, even though the fact at issue in the pleadings.	Not adopted in any state.	Not adopted.

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
48. *Appeals from Inferior Trial Courts—As of Right*	Should be avoided, principally through strengthening the inferior courts; abolition of justice of peace courts and substituting properly organized municipal courts.	About half of the states permit appeal as of right; some have limitations as to amount, usually about $20.	Appeals as matter of right go according to statute from inferior courts to superior trial courts or to appellate divisions or terms of such courts.
49. *Appeals from Inferior Trial Courts—Trial* De Novo	Same recommendation as above.	A majority of the states try *de novo* especially where no record below.	Among those which review without trial *de novo*, except on appeal from justice to county court in matter involving over $100.
50. *Pecuniary Limits upon the Right to Appeal*	Should provide that appeals involving below a certain amount may be taken only with approval of the appellate court on a showing that an important question of law is involved.	Vary from no limit to limitations of amounts from $50 to $500.	Among those which generally permit appeal as of right without limitation of amount (see exception above).
51. *Jurisdictional Requirements for Appeal*	A simple notice should be sufficient; defects therein should not affect jurisdiction; should preferably be filed in the lower court where clerk should send notice to appellee.	Most follow practice of written notice in lower court with various requisites as to notice to appellee.	Among the majority.
52. *Supersedeas Bonds*	Court should fix an amount sufficient to cover the full judgment. Enforcement of the judgment should not be stayed until the bond is filed.	States vary widely from none, unless ordered by the court to an amount equal to twice the judgment.	Listed among the states requiring a bond in an amount equal to twice the judgment.
53. *Assignment of Error*	Required prior to record only when appellant proposes to omit part of the record; otherwise the briefs should suffice.	Some few states insist upon same in all cases.	Among the majority which do not require it where the record contains the full stenographic report.

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
54. *Printed or Typewritten Records*	Should be permissible. If any party desires to print, the cost should not be taxable.	Most states permit typewritten or mimeographed transcript.	Among the few states which allow a typed record in limited cases only.
55. *Sending Original Records to Appellate Courts*	Insofar as possible the originals should be sent to the appellate court and no copies thereof should be required.	About equally divided —some do—some do on request of parties or the court; some not at all.	Among the states which do not use original records in the appellate courts (except in appeals from inferior trial courts).
56. *Abstracts of the Record*	Should not be required. Appendices to the brief should be sufficient to bring matters to the attention of the court.	Only a few states still require abstracts.	Among the majority.
57. *Form of Testimony in Appellate Record*	Either should be permitted to require question and answer form as to all or any part in lieu of statement in narrative form.	Only one state requires narrative form, a number permit it and about an equal number require question and answer form.	Among those states which require the complete record or the relevant parts in full.
58. *Correcting Record on Appeal*	Either the trial or the appellate court should have the power at any time to correct or amend the record on appeal where necessary to present the case fully.	In about half the states, the appellate court may authorize amendment.	Among the states in which the appellate court may dismiss the appeal if the record is defective.
59. *Length of Briefs*	The number of pages taxable should be limited by rule of the court.	The states are sharply divided—some do and others do not limit the number of pages. In some states the cost of a brief is not taxable.	Among the states in which the appellate courts can limit the number of pages.
60. *Memorandum Opinions*	Where no new principle involved should briefly summarize the facts and refer to the applicable statutes and cases.	Vary from no, little to frequent use of the memorandum decision.	Makes wide use of such opinions.

TOPIC	A.B.A. RECOMMENDATION	STATUS OF ADOPTION	STATUS IN NEW YORK
61. *Review of Non-jury Cases*	Findings of Fact should have the same effect on appeal in all cases tried without a jury whether tried in law or in equity.	Most states make no distinction between non-jury law and equity cases.	With the majority.
62. *Power of Appellate Court*	Should have power to enter a judgment without a new trial when the record as a matter of law justifies it; also unless prejudice would result should have power to remand for new trial of limited issues.	Only a few states require a remand; some will enter the proper order.	If record permits of correction, can enter a corrected judgment.

Committee Report

COMMITTEE ON INTERNATIONAL LAW

MEMORANDUM ON THE GENOCIDE CONVENTION

The Convention on the Prevention and Punishment of the Crime of Genocide is a fundamental first step in a world legal order. If the United States is unwilling to take this first step in a matter so fundamental as prohibiting the mass killing of human beings, it cannot hope for a development of world law and government.

Governments which have committed genocide in the past have been only too ready to turn from internal violence to war. Thus, prohibition of this international crime by international convention is in part a step against the greater violence of war. Also, our country which has found itself in the past in the position of protesting pogroms abroad should welcome this clarification of the legal basis of its protests.

Accordingly, it is submitted that the Convention should be ratified by the United States.

Ratification has been recommended by The Association of the Bar of the City of New York*, and the New York State Bar Association also took action favorable to the Convention**. In the American Bar Association differing points of view developed. The Section of International and Comparative Law favored ratification of the Convention with numerous reservations of

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* Resolutions adopted March 8, 1949 by The Association of the Bar of the City of New York:

"RESOLVED, that this Association approves the Convention on the Prevention and Punishment of the Crime of Genocide and recommends that the United States ratify the Convention;

"FURTHER RESOLVED, that, in approving the proposed Convention and recommending its adoption, this Association does not construe the omission of political, economic and other groups from those enumerated in the definition of genocide contained in Article II thereof as any direct or indirect indication of the desirability or advisability of such omission, or as direct or indirect sanctioning of the commission of the acts therein set forth with respect to such other groups."

** Resolutions adopted by the New York State Bar Association at its meeting January 27, 28, 1950:

"BE IT RESOLVED, that the New York State Bar Association, approve the Convention on the Prevention and Punishment of the Crime of Genocide and recommend that the United States ratify the Convention with the understanding or reservation that Article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals, and

an explanatory nature. On the other hand, the American Bar Association Special Committee on Peace and Law through the United Nations in opposing the ratification by the United States of the Genocide Convention as submitted stated that the proposed Convention involved important constitutional questions but did not resolve them in a manner consistent with our Constitution. The objections of the Special Committee of the American Bar Association have been summarized in this memorandum and have been answered point by point.

I

ABA SPECIAL COMMITTEE'S ARGUMENT

The Convention deals with a subject-matter properly and historically reserved to the jurisdiction of the separate states in the Union. Ratification would place this subject-matter under Federal jurisdiction and therefore violate the Tenth Amendment which provides "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

See Report of Special Committee on Peace and Law Through the United Nations, ABA, September 1, 1949, at p. 29.

ANSWER

1. Genocide now lies in the federal field. (Article 1, Section 8, Clause 10 of the Constitution, empowers Congress "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.")

2. The Treaty, however, is not limited by the Tenth Amendment. *U.S.* v. *Belmont*, 301 U.S. 324(1937) (upholding claim of U.S. as assignee of Soviet Government which obtained right to deposits by virtue of confiscation decree):

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies.*** Complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the

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"BE IT FURTHER RESOLVED, that the convention be approved with the further understanding or reservation that the United States assumes no obligation to enact Federal Legislation against genocide where acts which constitute genocide are already punishable by existing penal law."

The first understanding or reservation referred to by the New York State Bar Association has already been taken care of by the State Department (see Part VII, Section 5 below).

The second understanding or reservation concerning the lack of necessity for prohibiting by statute what has been already prohibited by statute can be handled in connection with enabling legislation. (See Part VII including Section 7 below.)

several states.*** In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."

3. *Geofroy* v. *Riggs,* 133 U.S. 258 (1890) (holding Treaty of 1853 with France permitting aliens to inherit property superior to contrary law of Maryland)

"It would not be contended that it [the treaty making power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country."

4. *Missouri* v. *Holland,* 252 U.S. 416 (upholding legislation implementing a treaty with Great Britain for the protection of migratory birds traveling between the United States and Canada over objection that the Tenth Amendment was violated).

"No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.*** Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power."

5. Treaties held valid in the past have repeatedly extended to matters ordinarily left to regulation by the states:

Title to land
Escheat and inheritance
Statute of limitations
Local taxation
Administration of alien estates
Prohibition against employment of foreign labor
Limitation of pawnbrokerage to citizens

[for citations, see *MacDougal, Rights of Man in World Community,* 59 Yale L.J. 60, at p. 95 (1949)]

6. Prohibition of genocide is a proper subject of international concern and of the most pressing urgency.

(a) 2 *Hyde, International Law* (1945 ed.) 1398:

". . . the advancement of an interest acknowledged to be of international concern may be regarded by the U.S. as well as by other States as necessitating restrictions upon the conduct of individuals who inhabit their respective territories in relation to activities which would appear normally to lack international significance and to pos-

sess a purely domestic aspect. Thus matters of occupation, conditions of labor, the production and manufacture, and even the transportation of particular articles, may suddenly attain an international aspect and so become objectives of a treaty of the U.S. The constitutionality of the result is not affected by the circumstance that the federal agency is enabled, through treaty making, to accomplish what the Congress may remain impotent to achieve."

(b) What is a proper subject of international concern grows and develops with changes in the nature of international relations. (See authorities in *MacDougal, supra,* pp. 93–94.)

(c) Genocide is at present a pressing problem of international concern and therefore a proper subject of a treaty.

II

ABA SPECIAL COMMITTEE'S ARGUMENT

Art. III of the Convention makes "direct and public incitement to commit genocide" a crime. This is an infringement of free speech guaranteed by the First Amendment of the Constitution.

ANSWER

Incitement to commit a crime which it is within the constitutional power to proscribe may be made a crime without violating freedom of speech provided a distinction is made between advocacy and incitement.

1. (a) *New Masses Pub. Co.* v. *Paton,* 244 F. 535 (SDNY 1917) per Learned Hand: "Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state."

(b) *Terminiello* v. *Chicago,* 337 U.S. 1 (1949) did not hold otherwise. It held only that the accused could not constitutionally be convicted under an ordinance which made a person guilty of a crime who stirred people to anger, invited public dispute or brought about a condition of unrest.

(c) Justice Brandeis concurring in *Whitney* v. *California,* 274 U.S. 357 at p. 376 stated:

> "But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."

(d) Counseling murder is not judicially protected (Mr. Justice Holmes in *Frohwerk* v. *U.S.,* 249 U.S. 204 [1919].

2. Since the convention is not self-executing, but requires legislation to make it enforcible as domestic criminal law, Congress in passing enacting legislation would be free to define "incitement" in a constitutional way.

(a) A treaty provision which is made dependent on legislative action does not take effect as the law of the land until such action is had. *Foster* v. *Nielson*, 2 Pet. 253; *U.S.* v. *Perchiman*, 7 Pet. 513.

(b) Art. V of the Convention requires enactment of legislation in each nation. Art. V of the Convention reads in part, as follows:

> "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention. . . "

(c) See also *U.S.* v. *Hudson*, 11 U.S. 31 (1812) holding that the courts of the United States cannot punish an act as a crime until the legislative authority of the Union has made such act a crime, fixed a punishment for it, and declared the courts that shall have jurisdiction of it.

III

ABA SPECIAL COMMITTEE'S ARGUMENT

It is unconstitutional to subject "our citizens and other persons within our territorial jurisdiction, to trial, conviction and sentence for acts of genocide committed in the United States, by an international penal tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with a domestic crime," such as, trial by jury, place of trial, speedy and public trial. See Report of Special Committee, supra, *pp. 30–31.*

ANSWER

The Convention in Art. VI provides that persons charged with the crime "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Therefore, this objection is academic. Ratification of the Convention would not require a U.S. citizen to be tried in any but a U.S. court. The problem of submitting to the jurisdiction of an international penal tribunal can be met when the need arises.

IV

ABA SPECIAL COMMITTEE'S ARGUMENT

Art. II and III of the Convention define certain acts as international crimes. Since only Congress has power to define offenses against the law of nations

(U.S. Const., Art. I), to do so by treaty is unconstitutional. See Report of Special Committee, supra, *at p. 37.*

ANSWER

1. The scope of the treaty power is not limited by the powers otherwise delegated to Congress. These other powers are concurrent, not conflicting.

(a) See authorities in *MacDougal, supra,* at pp. 98, 99.

(b) Treaties have frequently dealt with subjects otherwise delegated to Congress:

(i) International agreements affecting customs duties and regulating commerce which might otherwise be regulated under the commerce power.

(ii) Many treaties dealing with copyrights, naval armament and taxation, power over each of which is granted to Congress as an enumerated power.

(c) It follows necessarily from the established principle that treaties supersede prior Congressional acts.

V

ABA SPECIAL COMMITTEE'S ARGUMENT

The definition of crime in Art. II and III is unconstitutionally vague and uncertain; e.g., "in whole or in part"; "mental harm," etc.

ANSWER

The answer here is much the same as that offered under II 2, *supra,* i.e.:

(a) The Convention is not self-executing and until Congress passes enabling legislation, no one may be punished for a crime.

(b) Congress in its enabling legislation would be free to amplify upon the definitions in the Convention and therein remove vagueness or uncertainty, if any.

VI

ABA SPECIAL COMMITTEE'S ARGUMENT

The Genocide Convention does not go far enough in that it does not prohibit genocide against political and economic groups.

ANSWER

This is the "kill it with kindness" argument. The Association of the Bar of the City of New York did not construe the omission of political and eco-

nomic groups as any sanctioning of the commission of acts of genocide against such groups. Progress is made step by step. The report of the Committee on International Law of The Association of the Bar of the City of New York submitted on March 8, 1949, reads in part:

> "In Chase's Blackstone, 3d edition, pp. 882–883, it appears that piracy is an offense against the universal law of society and that certain English statutes making some other offenses piracy also did not operate to diminish the offense of piracy at common law. Common law crimes and statutory crimes can exist side by side until the enactment of a statute prescribing that no act shall be criminally punishable except as authorized by a statute (see New York State Penal Law, §22, and see *People* v. *Knapp*, 206 N. Y. 373, at 381). The development of international criminal law from the Nuremberg and other precedents will not be hindered by codification in conventions from time to time of certain phases of the subject."

RESERVATIONS TO THE GENOCIDE COVENANT ARE UNNECESSARY AND UNDESIRABLE

A reservation to a multilateral treaty is undesirable because it in effect requires renegotiation of the treaty with all parties thereto.

The Section of International and Comparative Law of the American Bar Association favors ratification of the Genocide Convention but with reservations. The reservations are unnecessary.

> (a) They merely define what would be the fair interpretation of the Convention.
>
> (b) The Convention looks to adoption of legislation to put it into effect and refinements of language can be introduced into such legislation if desired.

The specific reservations of the Section are referred to below:

1. *The words "in whole or in part" in Article II of the Convention mean in substantial part and the reservation on this point is unnecessary.*
   Testimony by Judge Robert P. Patterson on January 23, 1950 before a Subcommittee of the Senate Foreign Relations Committee.
   Testimony by Mr. Dean Rusk, Deputy Under-Secretary of State, before that Subcommittee on January 23, 1950 (page 4).
2. *The words "mental harm" need no further definition in the Convention. —No reservation is required.*
   This phrase was inserted at the suggestion of China because the Japanese had used opium to debauch the Chinese people, a case in the legislative history supporting the view that physical injury to mental faculties is

meant. (Official Records, General Assembly, Third Session, Part I, Sixth Committee, pp. 175–179.)

3. *The prohibition concerning "direct and public incitement to commit Genocide" does not violate the constitutional guarantees of free speech. —No reservation is required. See Part II,* supra.

4. *The phrase "complicity in Genocide" does not need further definition in the Convention as "aiding, abetting, counseling, commanding, inducing, or procuring the commission of Genocide."*
The United States representative at the AD HOC Committee on Genocide stated that he understood complicity "to refer to accessoryship before and after the fact and to aiding and abetting" the crime. (UN Doc. E 794, p. 21.) Any further definition can appear in the implementing legislation.

5. *The phrase "responsibility of a state for genocide" needs no reservation as to non-responsibility for money damages of a state to its own nationals.*
Such interpretation is already a part of the record and the Senate has been asked to ratify on this understanding. (Report of James E. Webb, Acting Secretary of State to the President—5 Exec. O. June 16, 1949, Department of State Publication 3643.)

6. *There need be no reservation concerning the same phrase not meaning that a National Government may be prosecuted as a defendant in any case arising under the Convention.*
Obviously, a sovereign can be sued in its own courts only if it consents. Anyway, a U. S. national could not sue the United States Government under this phrase in view of the interpretation above made. The forum of the International Court of Justice is only open to litigants who are states. (Art. 34 of the Statut of the Court.)

7. *There need be no reservation covering the fact that Articles I—VII are not self-executing, that federal legislation will be necessary, that such legislation will be in the federal field.*
The Covenant needs federal legislation to implement it (Article V). Articles I–IV and VI define the crime and require trial and punishment, but Article V is the key to how these requirements shall be implemented by legislation. Article VII (Extradition) requires legislation to implement it. (Report of Acting Secretary of State, *supra.*)

The Convention is not self-executing. (Testimony by Judge Robert Patterson, *supra.*)

Genocide lies in the federal field. (Article 1, Section 8, Clause 10 of the Constitution, empowering Congress "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.")

8. *The reservation that the defendant in a genocide trial shall be tried only by the Federal Court of the district wherein the act is alleged to have been committed is unnecessary.*
Obviously, such a matter can and should be left to the implementing

legislation of Congress in accordance with the U.S. Constitution. (Article V of the Convention.)

The Constitution of the United States (6th Amendment) provides for criminal trials by a jury of the state and district where the crime shall have been committed, which districts shall have been previously ascertained by law.

CONCLUSION

It is submitted that the Convention should be ratified by the United States.

Respectfully submitted,

COMMITTEE ON INTERNATIONAL LAW*
OF
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

A. A. BERLE, JR., *Chairman*

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* MURRAY C. BERNAYS, DUDLEY B. BONSAL, and RENÉ A. WORMSER, members of the Committee, have abstained from the preparation and approval of this memorandum.

February 14, 1950

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE.

THE CONTRACTING PARTIES,

HAVING CONSIDERED the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

RECOGNIZING that at all periods of history genocide has inflicted great losses on humanity; and

BEING CONVINCED that, in order to liberate mankind from such an odious scourge, international co-operation is required;

HEREBY AGREE AS HEREINAFTER PROVIDED:

ARTICLE I.

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II.

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

ARTICLE III.

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

ARTICLE IV.

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V.

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

ARTICLE VI.

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII.

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

ARTICLE VIII.

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

ARTICLE IX.

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the re-

sponsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

ARTICLE X.

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of . . .

ARTICLE XI.

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XII.

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

ARTICLE XIII.

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

ARTICLE XIV.

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

ARTICLE XV.

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

ARTICLE XVI.

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE XVII.

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

(a) Signatures, ratifications and accessions received in accordance with article XI;

(b) Notifications received in accordance with article XII;

(c) The date upon which the present Convention comes into force in accordance with article XIII;

(d) Denunciations received in accordance with article XIV;

(e) The abrogation of the Convention in accordance with article XV;

(f) Notifications received in accordance with article XVI.

ARTICLE XVIII.

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in article XI.

ARTICLE XIX.

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

The Library

SIDNEY B. HILL, *Librarian*

CHECKLIST OF BAR ASSOCIATION ADDRESSES AND LECTURES

"A lawyer without history and literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

SIR WALTER SCOTT

The addresses, lectures and speeches represented in the following checklist were delivered before lay and professional audiences at the House of The Association of the Bar of the City of New York. The subjects discussed cover a wide range from the practical questions affecting the every day life of the practitioner to the problems in the higher realm of jurisprudence. Many of them were the direct inspiration for important social and legal reforms. "The Ministry of Justice," an address delivered by Benjamin N. Cardozo in 1921, led eventually to the formation of the Judicial Council and the Law Revision Commission.

Other lectures give authoritative reports by statesmen on international affairs. In 1920, Elihu Root described to the members the nature and jurisdiction of the Permanent Court of International Justice.

Legal and judicial milestones were commemorated in historic addresses by visiting jurists. All these occasions have served to enrich the life and literature of the law.

This is part one of the checklist. A supplement will appear in a subsequent issue of THE RECORD.

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